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No. 80-1595

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH C. FRADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

GEORGE W. JONES
Assistant to the Solicitor General

JOHN R. FISHER
Attorney

Department of Justice
Washington, DC 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the "plain error" standard of Fed. R. Crim. P. 52(b) governs the availability of collateral relief from a criminal conviction that is challenged on the basis of erroneous jury instructions to which no objection was made at trial or on direct appeal.

2. Whether, assuming "cause" must be shown to excuse a defendant collaterally attacking his conviction from the consequences of his failure to make timely objection, that standard is satisfied by the conclusion that objection may have been thought futile.

3. Whether respondent suffered actual prejudice as a result of the erroneous jury instructions sufficient to warrant setting aside his conviction on collateral attack.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-18a) is reported at 636 F.2d 506. The order of the district court (Pet. App. 29a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on August 4, 1980. A petition for rehearing with a suggestion for rehearing en banc was denied on October 22, 1980 (Pet. App. 21a-28a). On January 13, 1981, the Chief Justice extended the time in which to petition for a writ of certiorari to and including February 19, 1981. On February 11, 1981, Justice Bren-

nan further extended the time in which to petition for a writ of certiorari to and including March 21, 1981. The petition was filed on March 20, 1981, and was granted on June 29, 1981 (J.A. 59). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

1. 28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

2. Rule 30 of the Federal Rules of Criminal Procedure provides in pertinent part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection * * *.

3. Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

1. On March 13, 1963, respondent and Richard Gordon murdered Thomas Bennett in his home. Bennett's "head had been caved in by several blows from a blunt instrument and a mixture of blood and brains was coming from the wounds. ** * One of the victim's eyes had

been knocked from its socket and was lying on his cheek when the officers arrived." *Frady* v. *United States*, 348 F.2d 84, 100 (D.C. Cir.) (en banc) (*Frady I*), cert. denied, 382 U.S. 909 (1965). See Tr. 121, 168, 189, 359-365. Respondent and Gordon battered and stomped their victim to death. One of the murder weapons appears to have been a broken piece of a table top. See Tr. 198-199, 368-369, 386. There were horseshoe-shaped marks on the victim's neck and chest that corresponded in size and shape with the metal heel plates on respondent's leather boots (Tr. 202, 259-260, 363-364, 369-370); dried blood was found around the heel of respondent's right boot and in numerous other places on both of his boots (Tr. 65-66, 202, 297-298, 301).

Hearing the victim's screams for help during the struggle, which lasted for approximately ten minutes, a neighbor called the police. See Tr. b-57 to b-59. Two officers arrived as respondent and Gordon emerged from the doorway of Bennett's house. Tr. 54-57, 109-112. One of the officers heard one of them say "the cops" as they came out of the door and ran down the street to a car that was waiting with its motor running. Tr. 58, 62, 86, 113-115. As they ran, Gordon discarded the victim's wallet and a pair of gloves. Tr. 59, 68, 225-226.[1] When the defendants were arrested almost immediately thereafter, both were covered with blood. Tr. 65-66, 124-125.

Investigation revealed that respondent had driven past his victim's house two separate times on the day of the murder. From this and other evidence at trial, "the jury could have concluded that Frady and Gordon twice reconnoitered so they would know Bennett's house when they returned later in the evening after darkness had completely fallen" (*Frady I*, *supra*, 348 F.2d at 102). Immediately before the murder, respondent and Gordon

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[1] Gordon had picked up the gloves just before entering Bennett's house. See Tr. a-100. "Significantly, the murder weapon bore no fingerprints" (*Frady I*, *supra*, 348 F.2d at 101 n.3).

met with the victim's brother, George Bennett, who told them that "he needed time to get the furniture and things settled" (Tr. a-72, a-86). During the course of their conversation, respondent asked the victim's brother if a man could be killed by hitting him in the chest: "could you break a rib and fracture or puncture a lung, could it kill a person" (Tr. a-86). As respondent and Gordon prepared to leave, George Bennett promised them a "bonus" if they did a "good job" (Tr. a-92). "[T]he jury could well have concluded that Frady and Gordon were assassins hired by George Bennett to do away with his brother in order to get his furniture and other possessions" (*Frady I*, *supra*, 348 F.2d at 103).

At trial, the defense was a complete denial of responsibility. Respondent's attorney attacked the credibility of the prosecution witnesses and the plausibility of the prosecution's theory of the case, suggesting that another man, the real murderer, had been seen leaving the house of the victim. The question of intent was not in issue; the evidence contained no hint of self-defense or any other defense affecting the degree of culpability. Neither respondent nor Gordon testified.

The elements of first-degree murder in the District of Columbia, as pertinent here, require that the killing be done "purposely * * * of deliberate and premeditated malice" (D.C. Code Ann. § 22-2401 (1961)). A finding of malice alone, without deliberation and premeditation, can support a conviction only for second-degree murder (D.C. Code Ann. § 22-2403 (1961)). Absent malice, a culpable homicide is classified as manslaughter. During a lengthy charge to the jury, the trial court explained (J.A. 27-28; emphasis added):

> [I]n its ordinary use in everyday life, the word malice would indicate a feeling of hatred or ill will toward another or a feeling of hastility [sic] towards [sic] an individual. In its legal sense, however, malice has a broader significance. It is a state of mind showing a heart, regardless of social duty, a

mind deliberately bent on mischief, a generally depraved, wicked and malicious spirit.

Malice, as the law knows it, may also be defined as the condition of mind which prompts a man to do a wrongful act wilfully, that is on purpose, to injury of another or to do intentionally a wrongful act toward another without justification or excuse. Malice may be either express or implied. Express malice exists when one unlawfully kills another in pursuance of a wrongful or unlawful purpose without legal excuse. Implied malice is such as may be inferred from the circumstances of the killing, as, for example, where the killing is caused by the intentional use of fatal force without circumstances serving to mitigate or justify the act, or when an act imposts [sic] danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.

In determining *whether a wrongful act is intentionally done and is therefore done with malice aforethought*, you should again bear in mind that every man is presumed to intend the natural and probable consequences of his own act. As I have already told you, the intent may be deduced from all the circumstances.[2]

The instrument or means by which a homicide has been accomplished is always to be taken into consideration in determining whether the act is criminal and in what degree it may be so. If in a prosecution for homicide it is shown that the accused used a deadly weapon in the commission of the homicide, *the law infers or presumes from the*

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[2] While defining the elements of first-degree murder, the court had already told the jury (J.A. 27; emphasis added):

> If a man uses upon another an instrument of such a nature and in such a way and under such circumstances that such use would naturally and probably result in death, *then you are not compelled to presume that he intended to kill from such acts but have the right to consider them in reaching a determination of his intent.*

use of such weapon in the absence of explanatory or mitigating circumstances the existence of the malice essential to culpable homicide.[3]

No objection was made to these instructions by the defense. The jury found both defendants guilty of first-degree premeditated and deliberate murder and of robbery, but, in accordance with the trial court's instructions that the defendants could not be convicted of both premeditated murder and felony murder, the jury returned verdicts of not guilty on the felony-murder count.[4]

2. On direct appeal, the court of appeals, sitting en banc, affirmed respondent's conviction for first-degree murder, specifically rejecting his claim that the evidence of premeditation and deliberation had been insufficient. *Frady I, supra,* 348 F.2d at 85-86, 99-103.[5] Two years

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[3] The italicized portions of the instructions in the text were the basis for the decision of the court of appeals in this case. The court of appeals expressly declined to decide whether this Court's decision in *Sandstrom* v. *Montana,* 442 U.S. 510 (1979), was applicable in this case (Pet. App. 5a-6a n.7). Compare *Burton* v. *Bergman,* No. 80-1497 (6th Cir. May 21, 1981) slip op. 5 n.3, with *United States* v. *Spiegel,* 604 F.2d 961, 969 n.15 (5th Cir. 1979), cert. denied, 446 U.S. 935 (1980).

[4] One week after the verdict, respondent and his co-defendant filed a motion for new trial, specifying 24 alleged errors, among them "failing to instruct the jury as requested" (R. 27). Four instructions prepared by defense counsel, dealing with reasonable doubt and circumstantial evidence, had been requested but denied (R. 22). The instructions complained of in this case, however, were not mentioned. ("R." refers to the record in the court of appeals.)

[5] The court also affirmed respondent's robbery conviction. For reasons that are immaterial in this case, the court vacated the sentence of death that had been imposed on the murder conviction and remanded the case, directing the trial court to resentence respondent to life imprisonment, "the only sentence other than death that [could] be imposed" under the statute as it existed then. *Frady I, supra,* 348 F.2d at 85. In accordance with the instructions of the court of appeals, the trial court resentenced

later, the court of appeals stated in another case that it was error to instruct a jury that "the law infers * * * malice" from the use of a deadly weapon and that a correct statement would be that the law permits the jury to infer malice. *Belton* v. *United States*, 382 F.2d 150, 154 (D.C. Cir. 1967); see also *Howard* v. *United States*, 389 F.2d 287, 291 (D.C. Cir. 1967).[6] In *Belton*, the court declined to find "plain error," however, and affirmed the conviction for first-degree murder, saying: "A jury inferring premeditation and deliberation could hardly have failed to infer malice" (382 F.2d at 155).[7] The following year the court of appeals noted that "[a] wrongful act intentionally done is not therefore done with malice" (*Green* v. *United States* (*Green I*), 405 F.2d 1368, 1370 (D.C. Cir. 1968)) and accordingly held that it was error to equate the two concepts in jury instructions by using the phrase "whether a wrongful act is intentionally done and, therefore, is done with malice" (*ibid.*). See *United States* v. *Wharton*, 433 F.2d 451 (D.C. Cir. 1970); *Sims* v. *United States*, 405 F.2d 1381, 1384 n.5 (D.C. Cir. 1968). As in *Belton*, the court attributed the trial court's misstate-

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respondent to life imprisonment on the murder conviction. The district court also expressly stated that the sentence on the robbery conviction, which would have become academic had the death sentence been carried out, was to be consecutive to the sentence of life imprisonment.

The defects in the instructions complained of in this case were not raised in respondent's unsuccessful petition for a writ of certiorari.

[6] In *Belton* the court attributed the trial court's misstatement to inadvertence, stating:

> We have little doubt that if objection had been made this slip of the tongue by a capable trial judge—assuming the reporter heard him right—would have been corrected.

382 F.2d at 154.

[7] In *Howard* the court also declined to find "plain error" requiring reversal. 389 F.2d at 291.

ment to "inadverten[ce]" (*Green I*, *supra*, 405 F.2d at 1370) rather than to any lack of clarity in the law.[8]

3. Beginning in 1965 respondent filed at least six meritless motions seeking to have his sentence reduced, modified, or vacated (including one alleging ineffective assistance of counsel). In 1978 he moved to vacate his sentence on the robbery conviction because the murder and robbery arose out of the same transaction (Pet. App. 2a-3a n.2). The motion was denied, and the court of appeals denied leave to appeal in forma pauperis, concluding that there was no merit in the claim. *United States* v. *Frady*, 607 F.2d 383, 385 (D.C. Cir. 1979) (*Frady II*). In a motion for reconsideration filed in the court of appeals, respondent modified his claim, arguing that the consecutive sentence on the robbery conviction violated the Double Jeopardy Clause. See note 5, *supra*. Since the robbery sentence was originally "concurrent with the sentence of death for the murder" (607 F.2d at 386), respondent had already begun to serve the sentence when the court of appeals vacated the death sentence and remanded for resentencing (*id.* at 386-387). Therefore, the court of appeals concluded, "alteration" of the robbery sentence by making it consecutive to the sentence for murder violated the Fifth Amendment. The court of appeals directed the district court to enter an order making the robbery sentence concurrent with the life sentence on the murder conviction. 607 F.2d at 387.

4. Three months after the decision in *Frady II* was announced and 16 years after his trial, respondent again collaterally attacked his murder conviction pursuant to 28 U.S.C. 2255. For the first time (see Pet. App. 3a n.3), respondent claimed that the erroneous jury instructions on malice given at his trial warranted vacating his murder conviction. The district court denied the motion on the ground that respondent either had or

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[8] None of these decisions purported to rest on constitutional grounds or to overrule any prior decision.

"could have" raised these claims on direct appeal from his 1963 conviction or in one of his previous motions for relief under 28 U.S.C. 2255 (Pet. App. 29a). The court of appeals reversed (Pet. App. 1a-18a).

Relying on *Davis* v. *United States*, 411 U.S. 233 (1973), the court of appeals reasoned that since "plain error" (Fed. R. Crim. P. 52(b)) in jury instructions could be noticed on direct appeal notwithstanding a failure to object at trial as required by Fed. R. Crim. P. 30, "plain error" could also be noticed on collateral attack (Pet. App. 6a-8a). Respondent's failure to object at trial consequently did not bar consideration of his claims on collateral attack. The instructions were clearly wrong in light of *Belton*, *Howard*, *Green* and *Wharton* (Pet. App. 5a), and, in the court's view, "the evidence of malice was equivocal" (*id.* at 11a). Since the erroneous instructions "may well have precluded the reasonable juror from considering manslaughter as a possible verdict" (*ibid.*), the court found that the plain error standard had been satisfied.

The court also held that if the "cause" and "actual prejudice" standard of *Davis* were applicable, it too was satisfied (Pet. App. 14a-15a n.17). Since the erroneous instructions "were standard" (*ibid.*) at the time of respondent's trial, his "counsel had every right to assume that any objection to the instructions would have been futile" (*id.* at 13a). According to the court of appeals, the assumed futility of objection was sufficient "cause" under *Davis* to excuse the failure to object. The showing of "actual prejudice" required by *Davis* was established, according to the court of appeals, because the evidence of malice was "equivocal" and the instructions may have precluded the jury from returning a manslaughter verdict.[9]

[9] The court of appeals did not comment on the district court's conclusion (Pet. App. 29a) that respondent was not entitled to relief because he could have raised his present contentions in his prior motions for relief under 28 U.S.C. 2255. See *Sanders* v. *United States*, 373 U.S. 1, 17-18 (1963).

The court of appeals denied the government's petition for rehearing en banc, four judges dissenting (Pet. App. 21a-28a). In the dissenters' view, the panel (*id.* at 28a),

> [u]sing the standard of direct appeal instead of collateral review; ignoring the *en banc* decision * * * on direct appeal; mischaracterizing evidence this court had found to be clear, convincing and sufficient; * * * misinterpreting and misapplying recent Supreme Court cases * * * [had] managed to free at last a brutal contract killer originally thought worthy of the death penalty.

SUMMARY OF ARGUMENT

I.

Society's interest in generally enforcing contemporaneous objection rules is substantial and is not subject to serious dispute. On direct appeal, the plain error doctrine codified in Fed. R. Crim. P. 52(b) permits a court to recognize and correct obvious and prejudicial errors notwithstanding counsel's failure to make timely objection or to raise the claim on appeal. See, *e.g.*, *Wiborg* v. *United States*, 163 U.S. 632, 659 (1896). The court may correct error essentially without regard to the reason for the failure to raise the claim. Even on direct appeal, however, society's substantial interests in generally enforcing contemporaneous objection rules should not be lightly disregarded. See, *e.g.*, *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). However the balance is struck on direct review between (1) the individual's interest in obtaining an error free trial (notwithstanding his procedural default) and (2) society's interest in enforcing legitimate procedural rules, the latter is substantially more weighty in collateral proceedings, and therefore contemporaneous objection rules should ordinarily be strictly enforced in that context. See *Henderson* v. *Kibbe*, *supra*, 431 U.S. at 154 n.13. This Court has repeatedly emphasized society's strong interest in preserv-

ing the finality of criminal judgments (see, *e.g.*, *Sumner* v. *Mata*, No. 79-1601 (Jan. 21, 1981), slip op. 11 n.3) and the fundamental differences between direct review and collateral proceedings (see, *e.g.*, *United States* v. *Addonizio*, 442 U.S. 178, 184-185 & nn.10-11 (1979)).

Giving due effect both to the substantial interests served by enforcing contemporaneous objection rules and to the differences between direct review and collateral proceedings, this Court adopted the "cause and prejudice" standard for determining when a procedural default can be excused on collateral attack. See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Davis* v. *United States*, 411 U.S. 233 (1973). The cause and prejudice standard has its origins in Fed. R. Crim. P. 12; it has been "incorporated directly into the body of law governing the availability of federal habeas corpus review." *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 85; see *Francis* v. *Henderson*, *supra*, 425 U.S. at 542. The interests in finality and orderly procedure are the same in the federal and state criminal justice systems. See *Francis* v. *Henderson*, *supra*, 425 U.S. at 542. Accordingly, the cause and prejudice standard is equally applicable to collateral attacks by federal prisoners as to those by state prisoners.

The court of appeals' holding in this case that the "plain error" principle of Rule 52(b) is applicable in collateral proceedings effectively nullifies the "cause" element of the cause and prejudice standard, obliterates the distinction between direct appeal and collateral attack, and promises federal prisoners endless "appeals" pursuant to 28 U.S.C. 2255. Society's interest in the finality of criminal judgments and orderly trial procedure "deserves greater respect" (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 88).

II.

Respondent has failed to demonstrate "cause" sufficient to justify relief on collateral attack in the face of his failure to make timely objection in accordance with Fed. R. Crim. P. 30.

1. In both *Wainwright* and *Davis*, no explanation was offered for the failure to make timely objection, and in both cases this Court concluded that the substantive claims were barred without speculating as to the possible reasons for the procedural defaults. See *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 91; *Davis* v. *United States*, *supra*, 411 U.S. at 243-245. In this case, there is no evidence that the actual reason defense counsel failed to object to the erroneous jury instructions was a belief that objection would have been futile. Nevertheless, because the erroneous instructions were "standard" at the time of trial, the court of appeals concluded that respondent's "counsel had every right to assume that any objection to the instructions would have been futile" (Pet. App. 13a) and on that basis found sufficient "cause" to excuse the procedural default (Pet. App. 14a-15a n.17). If, however, respondent's attorney failed to object to the jury instructions for some reason other than the belief that objection would have been futile, the possibility that some other attorney might have failed to raise timely objection because he believed it futile provides no basis for excusing the procedural default in this case.

2. As we demonstrate elsewhere, it is doubtful that timely objection to the erroneous instructions in this case would in fact have been futile. If respondent's attorney failed to object to the jury instructions on malice because he *erroneously* believed that objection was futile, the court of appeals' holding in this case amounts to a conclusion that inadvertence or negligence is sufficient cause to excuse a procedural default. Absent a finding of constitutionally ineffective assistance of counsel, however, neither inadvertence nor negligence is enough. The possibility that an attorney may make an error of judgment or overlook a potentially meritorious claim is inherent in an adversary system, and even the "erroneous" decisions of counsel must ordinarily be deemed binding. See *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3, 512 (1976); *id.* at 514-515 & nn.3-4 (Powell, J., concurring).

3. Even assuming that respondent's attorney considered objecting to the malice instructions and that he *correctly* concluded that objection in the trial court and on direct appeal would have been futile, we submit that no "cause" sufficient to excuse the procedural default has been shown. See, *e.g.*, *Cole* v. *Stevenson*, 620 F.2d 1055, 1062-1063 (4th Cir.) (en banc), cert. denied, No. 80-5172 (Nov. 17, 1980). An attorney's judgment that a particular claim is not worth making because it would be futile is not different from any of the other strategic or tactical considerations that an attorney must weigh in determining how best to represent his client. The only significance of a "change" in the law of the sort we assume was effected by the subsequent decisions of the court of appeals is that (1) defense counsel might have come to a different conclusion as to whether objection should be made, and (2) the objection, if made, would have been sustained at trial or the conviction would have been reversed on appeal.

Neither the "cause and prejudice" standard nor contemporaneous objection rules like Fed. R. Crim. P. 30 turn on the extent of the litigant's knowledge or the clarity of the law. The major premise of the decision in *Wainwright* v. *Sykes* is the familiar principle "that a constitutional right may be forfeited * * * by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944). Thus, the inquiry mandated by the *Wainwright* "cause" requirement is not whether the litigant's failure to raise the claim is blameworthy or whether he knowingly and intentionally waived his claim (compare *Fay* v. *Noia*, 372 U.S. 391, 438-439 (1963)), but whether the reason asserted for the failure to make timely objection is sufficiently compelling to justify subordinating the interests of the state in orderly trial procedure and the finality of criminal judgments. The speculation, however substantial, that an objection would be rejected is not a suffi-

cient justification for excusing noncompliance with a contemporaneous objection rule.

III.

Even assuming the court of appeals correctly concluded that cause had been shown for excusing respondent's procedural default or that his claims were properly reviewable under a plain error standard, the record falls far short of demonstrating the kind of actual prejudice that would justify setting aside his conviction on collateral attack. When the brief erroneous statements in the charge to the jury are considered in context and in light of the evidence at trial, it is manifest that respondent suffered no prejudice.[10]

First, whatever slight adverse impact the erroneous statements might otherwise have had was substantially mitigated, if not eliminated, by the rest of the court's instructions to the jury. Viewing the instructions as a whole, it is highly unlikely that any of the jurors understood them to direct a finding of malice solely on the basis of a finding that a weapon had been used or that the killing had been intentional.

Second, even if the trial court had not made the erroneous statements concerning malice, the record compels the conclusion that the jury would have found malice in any event. The nature of the crime itself—a killing by means of an extended beating—virtually forecloses any conclusion that malice was absent. Moreover, the jury in fact found that the murder was premeditated and deliberate, having been properly instructed as to those elements; it is inconceivable that the jury that found the killing to have been premeditated and deliberate would nevertheless have concluded that it was not done with malice.

Finally, the court's instructions on malice were irrelevant to the defense asserted at trial, which did not call into question the degree of culpability, but instead in-

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[10] Even under Fed. R. Crim. P. 52(b) a criminal defendant must show that the claimed errors "affect[ed] substantial rights."

volved a total denial of participation in the crime, and an argument that the real murderer had escaped while the police were chasing respondent (J.A. 54-55).

* * * * *

This case involves only jury instructions concerning malice in a murder prosecution.[11] Nevertheless, the reasoning of the court of appeals is applicable in any case involving an arguably significant error in jury instructions or in evidentiary rulings. If, as the court of appeals held, the plain error standard of Fed. R. Crim. P. 52(b) is applicable on collateral attack, or the failure to object to erroneous jury instructions or to raise the point on appeal may be excused on collateral attack on the ground that objection might have been "assumed" to be futile, every change or clarification in the law concerning such matters will prompt a new round of collateral attacks. And if criminal convictions may be set aside on showings of prejudice as ephemeral as that made here, no criminal conviction will ever be final. "Appeals" under 28 U.S.C. 2255 will be "interminable" (*Sunal* v. *Large*, 332 U.S. 174, 182 (1947)).

ARGUMENT

I. THE "PLAIN ERROR" DOCTRINE HAS NO PLACE IN COLLATERAL PROCEEDINGS

A. Contemporaneous Objection Rules Should Ordinarily be Strictly Enforced in Collateral Proceedings

1. This Court has repeatedly recognized society's fundamental interest in the finality of judgments in criminal cases. "[B]oth society and the individual criminal de-

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[11] The defective instructions on malice given at respondent's trial were apparently quite commonly used (see note 25, *infra*). The decision in the instant case is therefore likely to render a large proportion of the murder convictions obtained in the District of Columbia prior to the decision in *Belton* v. *United States*, 382 F.2d 150 (1967), in cases involving the use of a weapon, subject to successful collateral attack.

fendant have [an interest] 'in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.'" *Sumner* v. *Mata*, No. 79-1601 (Jan. 21, 1981), slip op. 11 n.3, quoting *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).[12] See *Blackledge* v. *Allison*, 431 U.S. 63, 83-84 (1977) (Powell, J., concurring); *Stone* v. *Powell*, 428 U.S. 465, 491 n.31 (1976); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 259-266 (1973) (Powell, J., concurring). In *United States* v. *Addonizio*, 442 U.S. 178, 184-185 n.11 (1979), the Court elaborated on this theme:

> Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures. * * * Moreover, increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful.

The resources committed to the administration of criminal justice are finite and, like other scarce resources, must be rationally utilized. Time spent processing collateral attacks is time that cannot be devoted to disposing of current cases. See also *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979), quoting from *United States* v. *Smith*, 440 F.2d 521, 528 (7th Cir. 1971) (Stevens, J., dissenting). Too ready availability of col-

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[12] A lack of respect for the finality of judgments undermines the goals of deterrence and rehabilitation, which are integral to our system of criminal law. See Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452-453 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146-150 (1970).

lateral relief undermines the notion of finality, encouraging the view among criminal defendants and society at large that the administration of criminal justice in this country is little more than a relentless "quest for error" (*Bihn* v. *United States*, 328 U.S. 633, 638 (1946)).

2. Review on direct appeal provides a remedy for most significant errors; collateral relief is appropriately reserved for the extraordinary case:

> When Congress enacted § 2255 in 1948, it simplified the procedure for making a collateral attack on a final judgment entered in a federal criminal case, but it did not purport to modify the basic distinction between direct review and collateral review. It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice.

United States v. *Addonizio*, *supra*, 442 U.S. at 184. In enacting Section 2255, Congress provided "an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." *Stone* v. *Powell*, *supra*, 428 U.S. at 491-492 n.31. Nevertheless, "[s]o far as convictions obtained in the federal courts are concerned, the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal." *Sunal* v. *Large*, 332 U.S. 174, 178 (1947); see *United States* v. *Addonizio*, *supra*, 442 U.S. at 184 n.10; *United States* v. *Timmreck*, *supra*, 441 U.S. at 784; accord, *Stone* v. *Powell*, *supra*, 428 U.S. at 477 n.10. By its uncritical application of "plain error" principles to the present case, the court of appeals obliterated any meaningful distinction between direct appeal and collateral attack, nowhere acknowledging the repeated admonitions of this Court that there are fundamental differences between these two remedies.

3. As this Court recognized in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), enforcement of contemporaneous objection rules contributes significantly to the finality of

criminal judgments. Orderly trial procedure requires that objections to evidentiary rulings or to jury instructions be presented to the trial court in the first instance. The failure to make timely objection to potential errors occurring during the course of a trial is particularly egregious, since a timely objection might prevent any error. *Id.* at 88-89. See also *Henderson* v. *Kibbe*, 431 U.S. 145, 157-158 (1977) (Burger, C.J., concurring); *Estelle* v. *Williams*, 425 U.S. 501, 513-515 (1976) (Powell, J., concurring). For these reasons, Fed. R. Crim. P. 30 provides that "[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." It is true that several courts of appeals have held that "plain error" (Fed. R. Crim. P. 52(b)) in jury instructions affecting substantial rights may be noticed on direct appeal notwithstanding the command of Rule 30.[13] But, as this Court has noted, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson* v. *Kibbe*, *supra*, 431 U.S. at 154.

This case, however, is not a direct appeal, but a collateral attack on a final judgment. In this context, "[t]he strong interest in preserving the finality of judgments, * * * as well as the interest in orderly trial procedure, must be overcome before * * * relief can be justified." *Id.* at 154 n.13 (citations omitted).[14] Accord-

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[13] See, *e.g.*, *United States* v. *Spiegel*, 604 F.2d 961 (5th Cir. 1979), cert. denied, 446 U.S. 935 (1980); *Government of the Virgin Islands* v. *Navarro*, 513 F.2d 11 (3d Cir.), cert. denied, 422 U.S. 1045 (1975); see also *Namet* v. *United States*, 373 U.S. 179, 190-191 (1963).

[14] Rule 9(a) of the Rules Governing Proceedings in the United States District Courts under Section 2255 authorizes the denial of relief if the Government has been prejudiced by the delay in seeking relief. The Advisory Committee Note explains: "Subdivision

ingly, whatever may be the appropriate rule on direct appeal before the judgment becomes final, the importance of preserving the finality of criminal judgments requires strict enforcement of contemporaneous objection rules like Rule 30 on collateral attack.

B. Procedural Defaults May be Excused on Collateral Attack Only If Both Cause and Prejudice are Established

1. The court of appeals concluded that the appropriate "standard for review" in this case was found in Fed. R. Crim. P. 52(b), which gives courts discretion to notice and correct "[p]lain errors or defects affecting substantial rights * * *" (Pet. App. 8a). This holding is inconsistent with the "cause and prejudice" standard established by this Court for determining when a procedural default will be excused on collateral attack. See *Wainwright* v. *Sykes, supra; Francis* v. *Henderson*, 425 U.S. 536 (1976); *Davis* v. *United States*, 411 U.S. 233 (1973). Under the "cause and prejudice" standard, no relief can be granted in a collateral proceeding unless the movant demonstrates both that there was some compelling reason for his failure to raise the particular claim in a timely fashion and that he suffered "actual prejudice" from the error. The inquiry initially focuses upon the "cause" asserted to excuse the failure to comply with the procedural rule and its sufficiency in light of the purposes the procedural rule was designed to serve. By requiring the movant to demonstrate a sufficient reason for failing to comply with the contemporaneous objection rule, the "cause and prejudice" standard

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(a) provides a flexible, equitable time limitation based on laches to prevent movants from withholding their claims *so as to prejudice the government* both in meeting the allegations of the motion and *in any possible retrial*" (emphasis added). See generally *Henson* v. *Estelle*, 641 F.2d 250, 252-253 (5th Cir. 1981). The court of appeals dismissed this consideration, observing that the government had not been "prejudiced in *responding to the motion*" (Pet. App. 8a; emphasis in original).

serves the salutary purpose of encouraging litigants to comply with such rules and recognizes the fundamental differences between direct appeal and collateral attack.

The "plain error" standard of Rule 52(b), on the other hand, is inconsistent with the limited scope of collateral proceedings and, we submit, is inappropriate in that context. In the context of trial and direct appeal, the rule permits courts to recognize and correct obvious and prejudicial errors notwithstanding counsel's failure to make appropriate objection or to raise the claim on appeal. See, *e.g.*, *Wood* v. *Georgia*, No. 79-6027 (Mar. 4, 1981), slip op. 3 n.5; *Wiborg* v. *United States*, 163 U.S. 632, 659 (1896). It confers relatively broad discretion to correct errors overlooked by counsel essentially without regard to the existence of any excuse or justification for counsel's dereliction.[15] The inquiry on direct appeal focuses not upon the reasons for the failure to object, but upon the impact of the error. It is clear, therefore, that the court of appeals' adoption of "plain error" as the appropriate standard of review on collateral attack effectively nullifies the "cause" portion of the "cause and prejudice" standard.

2. In *Davis* v. *United States*, *supra*, the Court held that failure to challenge the composition of the grand jury before trial in accordance with Fed. R. Crim. P. 12, barred the claim on collateral attack absent a showing of "cause," as required by Rule 12, and a showing of prejudice. As to "cause," the Court explained (411 U.S. at 242):

> We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of "cause" for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely

[15] While the rule is applicable without regard to the reason for counsel's omission, it is appropriately applied only if the perceived error or defect affects substantial rights. See note 34, *infra*.

> different but much more liberal requirement of waiver [*i.e.*, deliberate bypass] in federal habeas proceedings.

Thus, the cause and prejudice standard has its origins in Fed. R. Crim. P. 12.[16] Because of the substantial policies furthered by generally enforcing contemporaneous objection rules, however, the cause and prejudice standard has been "incorporated directly into the body of law governing the availability of federal habeas corpus review." *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 85; see *Francis* v. *Henderson*, *supra*, 425 U.S. at 542.

Both *Wainwright* and *Francis* involved collateral attacks on state court convictions pursuant to 28 U.S.C. 2254, rather than attacks on federal convictions under 28 U.S.C. 2255. Nevertheless, as the Court explained in *Francis* (425 U.S. at 542, quoting *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969)):

> "[P]lainly the interest in finality is the same with regard to both federal and state prisoners . . . . There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants."

Nor is there any reason to give *less* preclusive effect to procedural defaults by federal defendants than to similar defaults by their state counterparts. See generally *United States* v. *Hearst*, 638 F.2d 1190, 1196 (9th Cir.

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[16] In *Davis* this Court also said that "no more lenient standard of waiver" should apply on collateral attack than in the criminal proceeding itself (411 U.S. at 240-241). Here, the court of appeals inverted the reasoning of *Davis*, citing it for the proposition that the *same* standard of review should govern on collateral attack and direct appeal (Pet. App. 8a & n.9). Although this is a conceivable interpretation of the *language* of *Davis* (see Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 Colum. L. Rev. 1050, 1060 (1978)), the Court's subsequent decisions have made it clear that the trial of a case "shall be the 'main event,' and that any subsequent collateral proceeding, at least where there have been procedural defaults at the trial, shall have the limited function of preventing 'a miscarriage of justice.'" *Id.* at 1062, quoting *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 90-91.

1980), cert. denied, No. 80-1445 (Apr. 27, 1981); *United States* v. *Williams*, 615 F.2d 585, 590-591 (3d Cir. 1980); *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980); *Buckelew* v. *United States*, 575 F.2d 515, 519-520 (5th Cir. 1978); *Sincox* v. *United States*, 571 F.2d 876, 879-880 (5th Cir. 1978). Indeed, the reasons for applying the cause and prejudice standard are even more compelling in the context of a collateral attack on a federal conviction, since the prisoner will, as in this case, already have had an opportunity to present his federal constitutional claims to a federal district court as well as to a federal appellate court. Compare *Fay* v. *Noia*, 372 U.S. 391, 415-418, 421-422, 424 (1963); see also *Stone* v. *Powell*, *supra*, 428 U.S. at 493-494 n.35.

In *Wainwright* v. *Sykes* this Court recognized the substantial policy considerations that underlie contemporaneous objection rules, and therefore rejected "deliberate bypass" (see *Fay* v. *Noia*, *supra*, 372 U.S. at 438-439) as the standard for determining whether a claim can be raised in federal collateral proceedings notwithstanding a procedural default. First, and foremost, timely objection may avert error, "thereby making a major contribution to finality in criminal litigation" (433 U.S. at 88); even if the objection comes too late to avoid an initial error, corrective measures may be taken or, at the very least, the likelihood that there will be further instances of similar errors is reduced. See *Estelle* v. *Williams*, *supra*, 425 U.S. at 508 n.3, 512.[17] Second, when

[17] Also, as the *Wainwright* Court noted with respect to constitutional claims concerning the admissibility of evidence (433 U.S. at 89), "[a]n objection on the spot may force the prosecution to take a hard look at its hole card, and even if the prosecutor thinks that the * * * trial judge will admit the evidence he must contemplate the possibility of reversal by the * * * appellate courts or the ultimate issuance of a federal writ of habeas corpus based on the impropriety of the * * * rejection of the federal constitutional claim." The same is true with respect to arguably erroneous jury instructions. See note 24, *infra*.

an individual is brought to court to stand trial, "[s]ociety's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens" (433 U.S. at 90). "Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification" (*ibid.*). Third, "the rule of *Fay* v. *Noia*, broadly stated, may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty * * * with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off" (433 U.S. at 89) and at a time when retrial is unlikely.[18] Fourth, if factual findings are necessary, "[a] contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding" (*id.* at 88). The trial judge will be able to assess the demeanor and credibility of witnesses and to make appropriate factual determinations, and a court that reviews the issue later will have the benefit of the trial court's judgment and insight.

The requirement of a contemporaneous objection also provides some assurance that the alleged error was actually considered damaging to the party who later complains. There are many tactical reasons why counsel will refrain from objecting even if an immediate objection might be sustained. The failure to raise an objection is often strong indication that an error that may appear significant on the cold record presented to a reviewing court was in fact not particularly important or damag-

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[18] Even if the lawyer does not consciously engage in such "sandbagging," a relaxed attitude toward contemporaneous objection rules discourages the kind of vigilance that will keep the trial as free from error as possible and preserve it as the "main event" rather than a "tryout on the road" for a later appeal (*i.e.*, collateral attack). *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 90.

ing to the non-objecting party. If timely objection is made, the trial judge is uniquely qualified to weigh the impact of the error in the context of the entire proceedings, thereby guarding "against the magnification on appeal of [errors] which were of little importance in their setting." *Glasser* v. *United States*, 315 U.S. 60, 83 (1942).[19]

Thus, unlike the plain error doctrine codified in Fed. R. Crim. P. 52(b), the cause and prejudice standard does not ignore the reason for the procedural omission or focus on possible prejudice alone. *Wainwright* rests on the principle "that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944).[20] The inquiry man-

[19] Much the same considerations suggest that the failure to raise claims of error on direct appeal should independently bar their assertion on collateral attack absent a separate showing of cause for their omission from the appeal. Usually the decision on direct review will be made soon enough after trial that a retrial is possible if the conviction is reversed. On the other hand, if the issue is not raised until years later on collateral attack, vacating the conviction often provides not merely a "remedy," but the "windfall" of what is in effect a dismissal of the charges. Likewise, if a remand for evidentiary hearings is required, the recollections of the witnesses generally will be fresher after direct appeal than after collateral attack. Furthermore, the failure to raise the issue on direct appeal often indicates that the alleged error was not in fact of substantial significance. Requiring a defendant to raise issues on appeal will appropriately serve society's interest in the finality of criminal convictions. We therefore submit that the failure to raise an issue on direct appeal should bar a claim on collateral attack absent a showing of cause and prejudice. See *Sunal* v. *Large*, *supra*; *Forman* v. *Smith*, 633 F.2d 634, 638-640 (2d Cir. 1980).

[20] See also *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Estelle* v. *Williams*, 425 U.S. 501, 513-515 (1976) (Powell, J., concurring); *Davis* v. *United States*, 411 U.S. 233 (1973); *Tollett* v. *Henderson*, 411 U.S. 258, 267-268 (1973); *Michel* v. *Louisiana*, 350 U.S. 91, 99 (1955). See generally Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. Pa. L. Rev. 473 (1978).

dated by the *Wainwright* "cause" requirement is whether the reason for the failure to make timely objection is sufficient to outweigh the substantial interests furthered by generally enforcing contemporaneous objection rules.[21] Because a collateral attack can be made at any time, even, as in this case, nearly two decades after trial, both the difficulty of adjudicating the legal claim and the consequences of a grant of relief on collateral attack may be substantially greater than on direct appeal. Accordingly, the cause and prejudice standard established by this Court for determining when a procedural default can be excused on collateral attack is appropriately much more stringent than the standards that govern on direct review.

Ignoring these basic considerations, the court of appeals applied the "plain error" principle in this case, thereby totally excusing respondent's failure to comply with the contemporaneous objection requirement of Rule 30 or to raise his claim on appeal. Because it requires no justification for the party's failure to object at trial, the "plain error" rule does nothing to encourage compliance with contemporaneous objection rules and may indeed have the opposite effect. Moreover, the application of this doctrine on collateral attack blurs the distinction between direct appeal and collateral attack and promises a prisoner innumerable "appeals" under a standard of review no more exacting than that appropriate for direct review. Society's strong and legitimate interest in the finality of judgments in criminal cases "deserves greater respect" (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 88). The "cause" and "actual prejudice" standard is responsive to

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[21] It should be emphasized that the inquiry is not whether the defendant's interest in having his claim reviewed on the merits outweighs the state's interest in enforcing its procedural rule in his particular case. Rather, the question is whether the reason offered by the defendant is sufficiently compelling to justify disregarding the state's substantial interests in generally enforcing its procedural rules.

the concerns underlying this fundamental interest; the plain error doctrine of Fed. R. Crim. P. 52(b) is not. See generally *Tyler* v. *Phelps*, 643 F.2d 1095, 1101 n.9 (5th Cir. 1981).

II. NO CAUSE SUFFICIENT TO EXCUSE THE FAILURE TO MAKE TIMELY OBJECTION TO THE ERRONEOUS JURY INSTRUCTIONS HAS BEEN SHOWN

Attempting to bolster the untenable conclusion that respondent's failure to object to the instructions at trial could be totally excused through application of the "plain error" rule, the court of appeals found "parenthetically" that the "cause and prejudice" standard was satisfied here (Pet. App. 14a-15a n.17). According to the court, the two erroneous instructions were "standard" at the time of respondent's trial, and, therefore, respondent's "counsel had every right to assume that any objection to the instructions would have been futile" (Pet. App. 13a).[22]

A. No Cause of Any Kind Has Been Established In This Case

As noted above, the major premise of this Court's decision in *Wainwright* is the "familiar" principle (*Yakus* v. *United States*, *supra*, 321 U.S. at 444) that rights may be lost, even in criminal cases, by failure to assert them in a timely fashion. The decision in *Wainwright* "leave[s] open for resolution in future decisions

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[22] Although the instructions may have been "standard" in 1963, our research has revealed no case in which they were approved prior to that time, and the court of appeals cited none. Furthermore, in both *Belton* and *Green I* (the two cases in which the instructions were first expressly disapproved), the courts seemed to regard the instructions as contrary to existing law and attributed the erroneous instructions to inadvertence on the part of the trial court. See 382 at 154; 405 F.2d at 1370. See also pages 32-33, *infra*.

the precise definition of the 'cause'-and-'prejudice' standard" (433 U.S. at 87); it is, however, quite plain that the cause and prejudice standard was intended to be substantially more stringent than the "deliberate bypass" standard of *Fay* v. *Noia* that it replaced. Under the deliberate bypass standard, if a criminal defendant could not be said to have waived his claim knowingly and intentionally, federal habeas corpus relief was generally available without regard to whether the claim would have been barred on direct appeal. See, *e.g.*, *Humphrey* v. *Cady*, 405 U.S. 504, 517 (1972); *Fay* v. *Noia*, *supra*, 372 U.S. at 438-439; *Kaufman* v. *United States*, 394 U.S. 217, 227-228 & n.8 (1969).

In contrast with the deliberate bypass standard, procedural rules requiring that particular types of claims be raised at or before trial or forfeited do not depend on whether the defendant or his counsel actually considered the claim and then decided against raising it. See, *e.g.*, Fed. R. Crim. P. 12, 30. Rather, the claims must be raised at the specified time or forgone, whether the failure to comply with the rule was knowing and intentional or not. Superimposing the *Fay* v. *Noia* deliberate bypass standard on state and federal procedural rules, therefore, had the undesirable effect of nullifying contemporaneous objection rules. While the contemporaneous objection rule might be enforced on direct appeal, federal habeas remained available. The ready availability of relief on collateral attack, however, discouraged enforcement of contemporaneous objection rules even on direct appeal. See *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 89-90. Thus, to the extent that enforcement of contemporaneous objection rules encouraged timely objection, the deliberate bypass standard substantially diluted that incentive.

Unlike the deliberate bypass standard of *Fay* v. *Noia*, the cause and prejudice standard does not require " 'an intentional relinquishment or abandonment of a known right or privilege' " (*Fay* v. *Noia*, *supra*, 372 U.S. at 439, quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). Rather, the failure to make timely objection

results in forfeiture of the right unless "cause" and "actual prejudice" are demonstrated. The inquiry mandated by the *Wainwright* "cause" requirement is not merely whether there is some hypothetical reason that might explain the failure to make timely objection, or even whether the attorney had a good reason for failing to do so, but whether the reason is sufficient to outweigh the substantial interests furthered by generally enforcing contemporaneous objection rules. The conclusion of the court of appeals in this case that the apparent or assumed futility of objection constitutes "cause" virtually denies the concept any content. In light of the forfeiture principle upon which the decision in *Wainwright* rests, and the compelling reasons stated for adopting the "cause and prejudice" standard, the assumed futility of objection cannot constitute sufficient "cause" to excuse a procedural default.

2. The court of appeals concluded that respondent's counsel "had every right to assume" (Pet. App. 13a) that objection to the instructions would have been futile. There is, however, no indication that counsel in fact decided not to object for this reason. The prospect that his requests might be denied did not deter respondent's counsel from requesting other jury instructions (R. 22) or from protesting the denial of those requests in a motion for new trial (R. 27) and on direct appeal. See *Frady I*, *supra*, 348 F.2d at 105-106. If the failure to object was not in fact the product of any assumption by counsel, reasonable or otherwise, about the futility of objection, the possibility that some other attorney might have elected to ignore the contemporaneous objection requirement because he believed objection futile is no reason for excusing the default in this case.

Moreover, this Court's decisions in *Wainwright* and *Davis* make it plain that the burden of showing "cause" for the failure to make timely objection rests on the movant. See, *e.g.*, Goodman & Sallett, *Wainwright* v. *Sykes: The Lower Federal Courts Respond*, 30 Hast. L.J. 1683,

1707 (1979). The speculation of the court of appeals in this case is no substitute for the requisite showing of "cause." "[I]t is not for this court to speculate as to possible reasons for the failure to object when [the movant] has advanced no explanation." *Tyler* v. *Phelps*, 643 F.2d 1095, 1100, 1101 n.9 (5th Cir. 1981). Accord: *Washington* v. *Estelle*, No. 80-1023 (5th Cir. June 16, 1981), slip op. 8086; see also *Conquest* v. *Mitchell*, 618 F.2d 1053 (4th Cir. 1980). In both *Wainwright* and *Davis*, no explanation for the failure to make timely objection was offered, and in both cases this Court concluded that the substantive claims were barred, without speculating as to the possible reasons for the procedural defaults. See *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 91; *Davis* v. *United States*, *supra*, 411 U.S. at 243-245.

B. Assumed Futility Of Objection Is Not Sufficient To Excuse A Procedural Default

As noted in the preceding discussion, the record affords no basis for the court of appeals' apparent assumption that respondent's failure to object to the erroneous instructions in this case was in fact based on any judgment by his counsel regarding the likely futility of a properly made objection. But even assuming *arguendo* either that this was in fact the reason for counsel's omission, or that the showing of "cause" may properly be predicated upon the reasons a hypothetical lawyer might have had for the procedural default rather than the actual reasons that existed in the particular case, we now show that futility of objection is not a proper basis for excusing a procedural default—either, as we discuss first, if the lawyer's assumption of futility is erroneous, or, as we subsequently argue, even if the judgment regarding futility is in fact accurate.

1.*a*. If counsel considered the possibility of objecting to the instruction but rejected (deliberately bypassed?) that option because he erroneously believed that objec-

tion would have been futile, that should not excuse the default.[23] Even accepting the court of appeals' implicit conclusion that an attorney's judgment that a particular claim is insubstantial or unlikely to be accepted constitutes a reasonable ground for not raising the claim, the erroneous belief that objection is futile is not sufficient "cause". The court offered no basis, and we perceive none, for distinguishing the assumed futility of objection from all the other strategic or tactical considerations that must be taken into account in deciding which claims should be pursued and which forgone. Not every conceivable argument can be effectively presented in any litigation. Of necessity, an attorney must focus his attention and efforts on those claims that he believes are most likely to prove helpful. Existing case law tending to support or undercut a particular claim is only one of the many factors that must be considered. The court of appeals effectively adopts the untenable position that because the assumed futility of objection *explains* the failure to make timely objection, it also excuses it.

We submit that the concept of "cause" cannot mean simply that defense counsel might have had some reasonable explanation for failing to make timely objection. See *Satterfield* v. *Zahradnick*, 572 F.2d 443, 446 (4th Cir.), cert. denied, 436 U.S. 920 (1978). With respect to those claims that the attorney considered and nevertheless failed to raise, there will always be some reason,

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[23] See *Estelle* v. *Williams*, *supra*, 425 U.S. at 514-515 (Powell, J., concurring); *United States* v. *Brown*, Nos. 77-2106 & 78-1646 (D.C. Cir. Aug. 10, 1981) (en banc), slip op. 5-6; *Breest* v. *Perrin*, No. 80-1635 (1st Cir. July 1, 1981), slip op. 7-8; *Washington* v. *Estelle*, No. 80-1023 (5th Cir. June 16, 1981), slip op. 8085-8086; *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980); *Polizzi* v. *United States*, 550 F.2d 1133, 1138-1139 (9th Cir. 1976); see also *Gates* v. *Henderson*, 568 F.2d 830, 843 n.6 (2d Cir. 1977) (en banc) (Oakes, J., concurring), cert. denied, 434 U.S. 1038 (1978). But see *Rachel* v. *Bordenkircher*, 590 F.2d 200 (6th Cir. 1978); *Collins* v. *Auger*, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978), cert. denied, 439 U.S. 1133 (1979).

and in most cases a good reason, for his decision. He may conclude that a claim is insubstantial in light of current law and that the likelihood of prompting a change in the law is small. Or, given his theory of the case or the strength of the prosecution's evidence, a lawyer might conclude that a particular claim is unlikely to affect the outcome of the trial even if successfully urged. See, *e.g.*, *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 93 n.2 (Burger, C.J., concurring). If a lawyer has several points to make at trial (or on appeal), any one of which might be dispositive, he may reasonably conclude that others are not worth pursuing or, indeed, harmful, on the theory that raising an unpromising argument might divert attention from or dilute the force of other arguments that are judged more likely to succeed. See *Cole* v. *Stevenson*, 620 F.2d 1055, 1071 n.25 (4th Cir.) (*en banc*) (Murnaghan, J., dissenting), cert. denied, No. 80-5172 (Nov. 17, 1980). If, as in the present case, the "error" is simply irrelevant to the chosen defense (see pages 47-48, *infra*), the attorney will have little if any reason to object.

An advocate's goal is to win the war or, failing that, to minimize the consequences of the loss, not simply to win as many little skirmishes as he can. Cf. *Tollett* v. *Henderson*, 411 U.S. 258, 267-268 (1973); *Brady* v. *United States*, 397 U.S. 742, 756-757 (1970); *McMann* v. *Richardson*, 397 U.S. 759, 768-771 (1970). The possible reasons for failing to raise a potentially meritorious claim are limitless. A decision to refrain from objection for reasons such as are suggested in the preceding paragraph would be an intentional and knowing one and arguably would even constitute a "deliberate bypass" of orderly trial procedures for raising the claim. See, *e.g.*, *Murch* v. *Mottram*, 409 U.S. 41 (1972); *Coco* v. *United States*, 569 F.2d 367 (5th Cir. 1978); *United States ex rel. Cruz* v. *LaVallee*, 448 F.2d 671 (2d Cir. 1971), cert. denied, 406 U.S. 958 (1972); cf. *Lefkowitz* v. *Newsome*, 420 U.S. 283, 291 (1975). See also *Wainwright* v. *Sykes*,

supra, 433 U.S. at 98-99 (White, J., concurring). Ironically, however, if the "cause" requirement of *Wainwright* is satisfied by the existence of a reasonable explanation for failure to raise a claim in timely fashion, the "cause and prejudice" standard would be more lenient than the "deliberate bypass" standard that it replaced.

b. In this case, of course, it is quite doubtful that objection would have been futile. In both *Belton* and *Green I* (the two cases in which the instructions were first expressly disapproved), the court of appeals seemed to regard the law on the point as clear. In both cases, the court attributed the erroneous instructions to inadvertence on the part of the trial court. See 382 F.2d at 154; 405 F.2d at 1370. There is little reason to assume that a timely objection would have gone unheeded in respondent's case.[24]

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[24] Timely objection to the instructions on malice would have forced the prosecutor to consider the possibility that the court of appeals would accept the common sense proposition that the "law" does not "infer[] or presume[]" the existence of malice, an element of the offense, but merely allows the jury to infer the existence of malice from the nature of the weapon used and the manner in which it was used. Or, since the definition of malice was clear at the time, the prosecutor would have been forced to consider the very substantial possibility that the court of appeals would accept the proposition that an intentional act is not "therefore" done with malice. Given the strength of the evidence of malice in this case, the prosecutor might well have agreed to an instruction that the jury "may infer" malice from the nature of the weapon and the way in which it was used. As to the second erroneous statement, it seems almost certain that the prosecutor would not have opposed eliminating the "therefore" language, since the court intended to (and did) explain (J.A. 27; emphasis added) that "malice" is the "condition of mind which prompts a man to do a wrongful act *wilfuly* [*sic*], that is on purpose, to injury of another or to do *intentionally* a *wrongful* act toward another *without justification or excuse*," thus directing the jury to find malice only if they found an act that was not only *intentional* but also *wrongful, wilful, and without justification or excuse*. Even if the prosecutor refused to accede to such requests, these same reasons might have led the trial judge to modify the instructions even though the modifications were not unambiguously required by any decision squarely on point.

Since 1966, pattern jury instructions for the District of Columbia have been published by the Young Lawyers Section [formerly the Junior Bar Section] of the Bar Association of the District of Columbia in a volume commonly referred to as the "Red Book." Although the first edition of these instructions was published in 1966, prior to the decisions of the court of appeals in *Belton* and *Green I*, the pattern instruction on first-degree murder does not contain the instructional errors complained of here. See D.C. Bar Ass'n, *Criminal Jury Instructions for the District of Columbia*, No. 83 (1st ed. 1966). Because of the number of appellate decisions in which one or both of these errors were noted, it cannot be doubted that these instructions were commonly used.[25] That these errors were not contained in the 1966 edition of the "Red Book," however, strongly supports the conclusion that a timely and properly explicated objection would not have been futile even before the decisions in *Belton* and *Green*. In any event, granting arguendo that it could reasonably have been deemed likely, or even certain, that the trial court would overrule an objection, a defendant's trial counsel is obviously aware, at the time he is deciding whether to raise a claim, that any conviction is subject to appellate review. It is difficult to believe that it would have been futile in 1965 for respondent to present his current objections to the jury instructions to the court of appeals that decided *Belton* in 1967 and *Green I* in 1968.

Thus, even accepting the court of appeals' speculation that respondent's counsel failed to make timely objec-

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[25] In addition to *Belton*, *Howard*, *Green I* and *Wharton*, see, *e.g.*, *United States* v. *Evans*, No. 81-1281 (D.C. Cir. Apr. 20, 1981); *United States* v. *Perkins*, 498 F.2d 1054 (D.C. Cir. 1974); *Mitchell* v. *United States*, 434 F.2d 483 (D.C. Cir.), cert. denied, 400 U.S. 867 (1970); *United States* v. *Green*, 424 F.2d 912 (D.C. Cir. 1970) (*Green II*), cert. denied, 400 U.S. 997 (1971); *Logan* v. *United States*, 411 F.2d 679 (D.C. Cir. 1968); *Sims* v. *United States*, 405 F.2d 1381 (D.C. Cir. 1968).

tion because it appeared futile, in this case that is no more than an assertion that the attorney erroneously or negligently failed to raise a potentially meritorious objection.[26] At least in the absence of a finding of constitutionally ineffective assistance of counsel, negligence or inadvertence is not cause sufficient to excuse a procedural default.[27] The possibility that an attorney may make an error of judgment or overlook a potentially meritorious claim is inherent in an adversary system, and ordinarily even the "erroneous" decisions of the attorney must be deemed binding. See *Estelle* v. *Williams*, *supra*, 425 U.S. at 508 n.3, 512; *id.* at 514-515 & nn.3-4 (Powell, J., concurring).

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[26] Although the assumption of "futility" would have been erroneous, it is far from clear, as demonstrated below (see Part III, *infra*) that the ultimate decision not to raise the claim was unreasonable.

[27] Compare *Breest* v. *Perrin*, *supra*, slip op. 7-8; *Washington* v. *Estelle*, No. 80-1023 (5th Cir. June 16, 1981), slip op. 8083, 8085-8086; *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980); and *Polizzi* v. *United States*, 550 F.2d 1133, 1138-1139 (9th Cir. 1976), with *United States* v. *Williams*, 615 F.2d 585, 591 (3d Cir. 1980); *Boyer* v. *Patton*, 579 F.2d 284 (3d Cir. 1978); and *Sincox* v. *United States*, 571 F.2d 876 (5th Cir. 1978). See generally *Graham* v. *Mabry*, 645 F.2d 603, 607-608 (8th Cir. 1981); *United States* v. *Hearst*, 638 F.2d 1190 (9th Cir. 1980), cert. denied, No. 80-1445 (Apr. 27, 1981); *Jiminez* v. *Estelle*, 557 F.2d 506 (5th Cir. 1977). See also *Gates* v. *Henderson*, 568 F.2d 830, 843 n.6 (2d Cir. 1977) (en banc) (Oakes, J., concurring), cert. denied, 434 U.S. 1038 (1978).

Some courts have suggested, however, that mere inadvertence or ignorance is sufficient cause. See *Rachel* v. *Bordenkircher*, 590 F.2d 200 (6th Cir. 1978) (inexperience, inattention, or lack of knowledge of the law sufficient cause); *Collins* v. *Auger*, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978), cert. denied, 439 U.S. 1133 (1979) (lack of knowledge of law or facts sufficient cause); see also *Jurek* v. *Estelle*, 593 F.2d 672, 683-684 n.25 (5th Cir.) (in capital case, serious misfeasance is sufficient cause), vacated, 597 F.2d 590 (1979) (see 5th Cir. R. 17), decision on rehearing en banc, 623 F.2d 929 (5th Cir. 1980), cert. denied, No. 80-763 (Mar. 23, 1981).

2. The court of appeals' conclusion that sufficient cause to excuse the procedural default had been shown in this case thus rests on the assumptions that respondent's counsel thought about objecting to the malice instructions, that he correctly concluded that objection would have been futile in the trial court, and that the claim would also have been rejected on direct appeal. Accepting these assumptions for present purposes, we submit that neither the futility of objection in 1963 nor the subsequent "change" in the law provides sufficient basis for disregarding the unequivocal command of Fed. R. Crim. P. 30. See *Cole* v. *Stevenson, supra*, 620 F.2d at 1062-1063; *Indiviglio* v. *United States, supra*, 612 F.2d at 631; *Dumont* v. *Estelle*, 513 F.2d 793, 798-799 (5th Cir. 1975); see also *Ratcliff* v. *Estelle*, 597 F.2d 474, 476-477 (5th Cir. 1979); *United States ex rel. Maxey* v. *Morris*, 591 F.2d 386, 391 (7th Cir. 1979).[28] Having failed to pursue the avenues for relief provided, respondent should not be permitted on collateral attack to justify his failure by saying he "deemed any [objection] futile." *Sunal* v. *Large, supra*, 332 U.S. at 181.

The significance of a change in the law of the sort we are assuming occurred here is essentially that (1) respondent's counsel *might have* come to a different conclusion as to whether objection should be made, and (2) the objection, if made, would have been sustained at trial or the conviction would have been reversed on appeal.[29] Thus, the court

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[28] But see *Isaac* v. *Engle*, 646 F.2d 1129, 1133-1134, 1138 (6th Cir. 1980) (Jones, J., concurring), cert. granted, No. 80-1430 (Apr. 20, 1981); *Myers* v. *State of Washington*, 646 F.2d 355, 359-361 (9th Cir. 1981); compare *Rummel* v. *Estelle*, 587 F.2d 651, 653 & n.2 (5th Cir. 1978) (en banc), aff'd on other grounds, 445 U.S. 263, 268 n.7 (1980).

[29] As we have shown above, the instant case does not appear to present a true change in the law, but rather presents at most a situation like that in *Sunal* v. *Large, supra*, 332 U.S. at 181, "where at the time of the conviction[] the definitive ruling on the question of law had not crystallized." Even where there has been a change in the law, however, we submit that the failure to raise the issue

of appeals' holding that the futility of objection at the time of trial is sufficient "cause" to excuse a procedural default may rest on the notion that a criminal defendant has some right to have the "important" legal issues in his case determined in light of the most recent decisions on the point or that a defendant should not be penalized for his attorney's failure to "anticipate" a subsequent decision. It would be said that because the defendant could not have known of the subsequent decision at the time of trial, he cannot be held responsible for the failure to raise the claim. Therefore, it is somehow unfair to "punish" him for failure to raise the claim by enforcing a contemporaneous objection rule. This approach is faulty for two reasons. First, a criminal defendant generally has no right to have the legal issues in his case determined in light of subsequent decisions.[30] Second, it misconceives the nature of contemporaneous objection rules and the cause and prej-

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at trial or on direct appeal constitutes a procedural default that precludes collateral relief unless the "cause and prejudice" test is satisfied. The change in the law is not alone sufficient to constitute "cause."

[30] As Judge Friendly pointed out in a similar context:

> There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause "litigation in these criminal cases [to] be interminable" [*Sunal* v. *Large*,] 332 U.S. at 182 * * *, but, in the sole interest of those already convicted of crime, would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens. * * * When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws.

United States v. *Sobell*, 314 F.2d 314, 324-325 (2d Cir. 1963).

udice standard, which, as noted above, do not turn on the extent of the litigant's knowledge or blame-worthiness.

a. This Court has frequently refused to give retroactive application to decisions announcing new legal rules in criminal cases. See, *e.g.*, *United States* v. *Peltier*, 422 U.S. 531 (1975); *Daniel* v. *Louisiana*, 420 U.S. 31 (1975); *Tehan* v. *Shott*, 382 U.S. 406 (1966); *Linkletter* v. *Walker*, 381 U.S. 618 (1965). A criminal defendant therefore plainly has no general right to have legal issues involved in his case determined or redetermined in light of the most recent decisions of this Court or other governing authority. Nor does a criminal defendant have any substantial basis for complaint if his attorney, though competent, fails to anticipate a particular holding on a point that could have been, but was not, raised at his trial. "'[A] defendant is entitled to a fair trial but not a perfect one,' for there are no perfect trials." *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973) (citations omitted).

b. It is of course true that in cases considering the retroactivity of new decisions this Court has treated the fact that the new rule relates to the reliability of the guilt-determining process as a consideration weighing strongly in favor of retroactivity. See *Hankerson* v. *North Carolina*, 432 U.S. 233, 241 (1977). The court of appeals employed such reasoning in holding that the decisions in *Wharton* and *Green I* should be applied retroactively to respondent's case (Pet. App. 15a-17a). But even assuming that those decisions are properly given retroactive effect, that does not resolve the question whether the failure to comply with legitimate procedural rules should bar the claim on collateral attack. This Court has recognized that procedural rules may bar relief on a claim even though subsequent decisions indicating that the claim has merit have been held retroactive. Indeed, this Court has expressed the view that a criminal defendant can be required to object to jury instructions even though they reflect standard, well-settled practice. In considering the possible impact of retroactive applica-

tion of *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), the Court observed (*Hankerson* v. *North Carolina*, *supra*, 432 U.S. at 244 n.8 (emphasis added)):

> If the validity of such burden-shifting presumption were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. * * * *The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.* See, *e.g.*, Fed. Rule Crim. Proc. 30.

Similarly, in *Lee* v. *Missouri*, 439 U.S. 461 (1979), this Court held *Duren* v. *Missouri*, 439 U.S. 357 (1979), retroactive, but specifically noted that

> in any case in which a jury was sworn subsequent to *Taylor* v. *Louisiana* and the fair-cross-section claim based on exclusion of women was rejected on direct review or in state collateral proceedings because of the defendant's failure to assert the claim in timely fashion, relief is unavailable under 28 U.S.C. § 2254 unless the petitioner can show cause for having failed to raise his claim properly in the state courts. See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

Lee v. *Missouri*, *supra*, 439 U.S. at 462.[31] The subsequent decision in *Duren*, though retroactive, was not thought to constitute sufficient "cause" to excuse the failure to make timely objection.

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[31] In *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), the Court held that the Sixth and Fourteenth Amendments require that petit juries be selected from a pool fairly representative of the community and that women could not be systematically excluded from jury service. *Taylor* is inapplicable to cases in which the jury was sworn prior to the date of that decision. *Daniel* v. *Louisiana*, 420 U.S. 31 (1975). In *Duren* v. *Missouri* the Court invalidated a state system which exempted women from jury service upon request.

3. Substantial policy considerations counsel against accepting the notion that apparent futility, or futility in fact, is sufficient "cause" to excuse a procedural default. First, and perhaps most important, a refusal to enforce procedural defaults for this reason could have extraordinarily sweeping consequences when a new rule is announced relating to a frequently used instruction or a recurring evidentiary point. Large numbers of prior cases, tried without objection under the prior practice, would become subject to invalidation in collateral attack proceedings.[32]

Accepting the assumed futility of objection as sufficient "cause" permits the attorney to deny the trial court the opportunity to consider the matter and to avoid error. Failure to raise the claim in the trial court also makes it less likely that a court reviewing the conviction on direct appeal will notice the error and correct it at a time when it is possible to retry the case. In addition, and perhaps of greater importance, the error is perpetuated and the number of criminal convictions that will be subject to collateral attack when it is finally corrected is increased.

Furthermore, indulging the assumption, as the court of appeals did in this case, that defense counsel failed to raise a claim because it would have been futile, too readily absolves defense counsel of the obligation to establish a record. Like the deliberate bypass rule, acceptance of the futility of objection as sufficient excuse for a procedural default removes incentives to raise claims that may prompt improvements in the law. Com-

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[32] The holding of the court of appeals in this case thus attaches a severe price to any decision to alter or abandon a frequently used instruction or commonly invoked evidentiary ruling. The impact of a change in the law could be limited by giving the new rule only prospective application, but, as noted above, this Court's decisions suggest that new rules affecting the reliability of the fact-finding process should be applied retroactively at least in those cases pending on direct review. *E.g.*, *Hankerson* v. *North Carolina*, *supra*, 432 U.S. at 241.

pare *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967).[33] There is little reason to spend time and effort pursuing a claim that is, by definition, unlikely to be successful, if nothing is lost by failing to do so.

Moreover, unless a retrospective judicial conclusion of futility is to be deemed sufficient without regard to the actual reasons for the default in the particular case, the federal courts will inevitably be drawn into the "complex task of disentangling excusable lack of clairvoyance from quiet strategic waiver. The answer in each case, turning on subtle degrees, would necessarily be haphazard, and its basis * * * inherently unsatisfactory" (*Dumont* v. *Esteile*, *supra*, 513 F.2d at 798). Except in a few clear cases involving the overruling of settled precedent, the judgment that objection could reasonably have been deemed futile will involve a substantial element of speculation and second-guessing that would be wholly unnecessary if the procedural rule had been obeyed.

Finally, accepting "futility" as sufficient "cause" would encourage the sort of "sandbagging" criticized in *Wainwright*. An objection or argument that, if made at trial, provides only marginal prospects of affecting the result even if successful, can increase in value after conviction. If it is entertained and accepted on direct appeal, the defendant will probably get a "second bite at the apple." See, *e.g.*, *United States* v. *Sobell*, 314 F.2d 314, 324-325 (2d Cir. 1963). A second chance for acquittal relatively soon after the first trial is valuable, but later events may make retrial substantially more difficult, if

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[33] As Judge Poole stated in dissent in *Myers* v. *State of Washington*, 646 F.2d 355, 364 (9th Cir. 1981):

> [I]t should be remembered that the boundaries of constitutional rights have historically been redefined, patient mete and meter, largely by the efforts of diligent and thoughtful attorneys who search for and raise "new" but logical and reasonable extensions of previously established, or at least suggested, doctrines.

not impossible. Thus, after all other claims have been rejected, a claim that might have been relatively insignificant at trial may as a practical matter become dispositive if accepted on collateral attack. The present case is a classic illustration of that proposition.

III. NO PREJUDICE HAS BEEN SHOWN TO HAVE RESULTED FROM THE ERRONEOUS JURY INSTRUCTIONS

The "cause and prejudice" standard requires not only a showing of "cause" to excuse a procedural default, but also a showing of "actual prejudice." *Davis* v. *United States*, *supra*, 411 U.S. at 245; *Francis* v. *Henderson*, *supra*, 425 U.S. at 542. When the record of his trial is appraised realistically, it seems plain beyond all serious dispute that respondent suffered no substantial prejudice because of the erroneous jury instructions given during his trial.[34]

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[34] Even under the plain error doctrine, the alleged error must be more than "plain" or "clear." The plain error test focuses primarily upon the prejudice suffered by the defendant. See *Tyler* v. *Phelps*, *supra*, 643 F.2d at 1101 n.9. In *United States* v. *McCord*, 509 F.2d 334, 341 n.10 (D.C. Cir. 1974) (en banc), cert. denied, 421 U.S. 930 (1975), the court of appeals recognized that "the doctrine of plain error encompasses those errors which are obvious, affect the substantial rights of the accused and if uncorrected would be an affront to the integrity and reputation of judicial proceedings." Numerous decisions make it clear that the plain error doctrine is to be invoked only in exceptional circumstances, when necessary to avoid a miscarriage of justice. See, *e.g.*, *Silber* v. *United States*, 370 U.S. 717, 718 (1962); *Johnson* v. *United States*, 318 U.S. 189, 199-201 (1943); *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); *United States* v. *Cormier*, 639 F.2d 1177, 1183 (5th Cir. 1981); *United States* v. *Brewer*, 630 F.2d 795, 801 (10th Cir. 1980); *United States* v. *Berry*, 627 F.2d 193, 199 (9th Cir. 1980), cert. denied, No. 80-5659 (Jan. 19, 1981); *United States* v. *Krasn*, 614 F.2d 1229, 1235-1236 (9th Cir. 1980); *United States* v. *Kopel*, 552 F.2d 1265, 1274 (7th Cir.), cert. denied, 434 U.S. 970 (1977); *United States* v. *Van Horn*, 553 F.2d 1092, 1094 (8th Cir. 1977); *United States* v. *Rudinsky*, 439 F.2d 1074,

1. It is well established that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973); accord, *Boyd* v. *United States*, 271 U.S. 104, 107 (1926). Moreover, "the process of instruction itself is but one of several components of the trial which may result in [a] judgment of conviction." *Cupp* v. *Naughten*, *supra*, 414 U.S. at 147. Thus, even on direct appeal, an appellate court must "view the [jury] charge itself as part of the whole trial." *United States* v. *Park*, 421 U.S. 658, 674 (1975). The question in a collateral proceeding "is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, [or the instruction otherwise resulted in an unconstitutional conviction, and] not merely whether the instruction is undesirable, erroneous, or even universally condemned." *Henderson* v. *Kibbe*, *supra*, 431 U.S. at 154 (citations and internal quotation marks omitted).[35]

In the instant case, it is highly unlikely that the erroneous instructions had any impact at all upon the jurors, who heard them as brief portions of a lengthy

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1076 (6th Cir. 1971). Even if this Court accepts the proposition that the plain error doctrine rather than the cause and prejudice test applies in Section 2255 proceedings, it is clear that respondent has not demonstrated the substantial prejudice required to justify reversal under the plain error standard.

[35] As noted above, none of the decisions of the D.C. Circuit in which the instructions involved in this case were disapproved purported to rest on constitutional grounds, although the court of appeals seems to have assumed that they did. *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), is, of course, inapplicable since there was no affirmative shift of the burden of proof. Furthermore, while *Mullaney* has been held retroactively applicable to cases pending on direct appeals when it was decided (see *Hankerson* v. *North Carolina*, *supra*), the court of appeals did not hold *Mullaney* applicable in this collateral attack and expressly declined to decide whether *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), was applicable to this case.

charge. "To a lawyer, there is an undeniable gulf between 'the law infers' and 'the law permits you to infer'" (*Belton* v. *United States*, *supra*, 382 F.2d at 154). To the ordinary juror, however, the "gulf" is likely to be perceived as a very thin line, particularly when, as in this case, the court also explained that malice was an element of the offense and that the jury had to find that the government had proved every element of the offense beyond a reasonable doubt. See *id.* at 154-155. As to the second erroneous statement, even if it is assumed that the jurors appreciated the significance of the phrase "and is therefore done with malice," it seems unlikely that they would have understood the judge to be directing them to find malice if they found intent. The court had just indicated that malice was to be inferred from all the circumstances and that to find malice the jury had to find that the act was not only intentional but also "wilful[ ]," "wrongful" and "without justification or excuse" (J.A. 27).

In any event, the remaining portions of the charge cured or mitigated whatever impact the brief, erroneous passages might otherwise have had. The trial court instructed the jury on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt (J.A. 19-20), reminding the jurors that, in determining whether the government had met this burden, they were to consider "the testimony of all the witnesses * * * and all the circumstances concerning which testimony ha[d] been introduced" (J.A. 20). In defining the elements of first-degree murder, the court instructed that "[i]f a man uses upon another an instrument of such a nature and in such a way and under such circumstances that such use would naturally and probably result in death, then you are not compelled to presume that he intended to kill from such acts but have the right to consider them in reaching a determination of his intent" (J.A. 27). After instructing on premeditation and deliberation (J.A. 28), the court concluded its instruc-

tion on first-degree murder, reminding the jury that the government must prove each of the elements beyond a reasonable doubt (*ibid.*).

2. When this case is compared to others in which the impact of the same instructions was considered, it is even more apparent that no "actual prejudice" resulted. In its opinion the court of appeals properly took into account its decisions in *Belton*, *Howard*, *Green I*, and *Wharton*. It totally ignored the fact that those were all decisions on direct appeal. In *Belton*, the decision that first disapproved the statement that "the law infers * * * malice" from the use of a deadly weapon, the court nevertheless *affirmed* a first-degree murder conviction, observing that "[a] jury inferring premeditation and deliberation could hardly have failed to infer malice." 382 F.2d at 155. A second-degree murder conviction was affirmed in *Howard*, although the same instruction had been given. In neither case did the court of appeals find plain error requiring reversal. It is strange that the defendants who blazed this trail *on direct appeal* did not benefit from the rulings that have been employed to free respondent on collateral attack.[36]

Although relying heavily upon *Green I* and *Wharton*, decisions in which murder convictions were reversed, the court of appeals overlooked crucial factual differences between those cases and this one. In *Green I*, the defendant, who was convicted of first-degree murder, had admitted firing the fatal shots and presented a claim of self-defense. He thus had squarely raised the questions of malice and intent, and the court emphasized that "on the facts there was an issue of manslaughter for the jury." 405 F.2d

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[36] There is something especially incongruous about finding plain error in a collateral attack by a federal prisoner such as respondent, who has already had his conviction painstakingly reviewed by an en banc court of appeals, to which the error in question either was not "plain" or was not deemed sufficiently substantial to warrant discussion in its thorough opinions, let alone reversal of the conviction.

at 1370. At the retrial the defendant was again convicted of first-degree murder. The court of appeals affirmed the conviction, although the trial court, without objection, had repeated one of the instructional errors that had led to the earlier reversal. The court emphasized that "it is inconceivable that the jury that found the appellant guilty of deliberate and premeditated murder would have failed to find malice * * *." *Green II*, *supra*, 424 F.2d at 913.[37]

In *United States* v. *Wharton*, *supra*, the defendant had been convicted of second-degree murder. As in *Green*, the defendant admitted shooting the decedent but claimed self-defense. The court emphasized that, unlike the situation in *Belton*, there had been no finding of premeditation and deliberation. 433 F.2d at 457-458. Because the conviction was for second-degree murder, and because malice was the only distinguishing element between second-degree murder and manslaughter, the court reversed the conviction.

In this case the court of appeals found no error in the instructions on premeditation and deliberation. Because of the manner in which the crime was carried out and the evidence that respondent had been hired to commit it, it is "inconceivable that the jury that found [respondent] guilty of deliberate and premeditated murder would have failed to find malice * * *." *Green II*, *supra*, 424 F.2d at 913. Neither the court of appeals nor respondent has suggested any plausible basis for concluding that any jury that found the murder to have been premeditated and deliberate could possibly have concluded that it nevertheless was not done with malice.

3. If respondent had objected to the erroneous instructions relied on by the court of appeals, the district court should properly have told the jury (1) that the law

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[37] Compare *Henderson* v. *Kibbe*, *supra*, 431 U.S. at 156: "[T]he jury's determination that the respondent acted recklessly necessarily included a determination that the ultimate harm was foreseeable to him."

permits the jury to consider the fact that the killing had been accomplished with a deadly weapon in determining whether the government had proved "malice" and (2) that in determining whether the government had proved that the killing was done intentionally, wilfully, wrongfully, without justification or excuse and, therefore, with malice aforethought, it should consider all of the surrounding circumstances. Given the evidence at trial, it is virtually certain that the jury that convicted respondent of first-degree murder would still have found malice even if these instructions had been given in lieu of the two erroneous statements.[38]

The evidence of malice was little short of overwhelming. Respondent and his colleague had been hired by the victim's brother and promised a "bonus" if they did a "good job." Respondent and his colleague bludgeoned and stomped their victim for at least 10 minutes, eventually crushing his skull with several blows from a blunt instrument. Compare, *e.g.*, *Howard* v. *United States*, *supra*, 389 F.2d at 290. If there was any justification for this senseless murder other than the "bonus" promised by the man who hired them, it was never revealed.[39]

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[38] Although the sentence of death was set aside on direct appeal, the jury's conclusion that respondent deserved to die for his crime is eloquent testimony that it surely would have found malice even if the court had said you "may infer malice" and had not used the unfortunate phrase which appears to equate intent with malice. As the dissenters noted, the verdict indicated that the jurors found "malice aplenty" (Pet. App. 28a).

[39] According to the court of appeals, the evidence of malice was "equivocal" (Pet. App. 11a, 13a). As the dissenting judges pointed out, however, the "evidence which [the court of appeals] sitting *en banc* found sufficient to support a verdict of first-degree murder simply cannot fairly be described as 'equivocal' " (Pet. App. 27a). Furthermore, the two factors cited by the court in support of its characterization of the evidence (Pet. App. 11a-12a & n.13) are wholly inadequate. That the jury acquitted respondent and his colleague of felony-murder is of no possible significance in light of the trial judge's instructions (J.A. 26, 37-38; see Pet. App. 28a)

4. Finally, the court's instructions on malice were simply irrelevant to respondent's chosen defense. There was no claim of self-defense, passion, accident or anything else suggesting the absence of "malice" or otherwise relevant to respondent's degree of culpability. Instead he disclaimed all responsibility and suggested that the murder had been committed by "a big man" who supposedly was seen leaving the victim's house.[40] It would have been totally inconsistent for respondent then to claim that he was guilty only of manslaughter, an inconsistency that surely would not have been overlooked by the jurors. Yet, in his Section 2255 motion filed some 16 years later,

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that it could not convict for both premeditated murder and felony-murder. And even if the jury overlooked that instruction, the court also instructed that if it did not believe that the defendants intended to rob at the time of or prior to the killing, the jury was to find them not guilty of felony-murder (J.A. 24; see also *id.* at 34). Thus it may be, as the dissenters observed, that "[t]he verdict * * * reflected the jury's belief that Frady entered the house intending not to rob, but to kill * * *" (Pet. App. 28a).

The one conclusion that is wholly untenable is that the acquittal on the felony-murder count reflected any doubt on the part of the jury about the element of malice. The second factor relied on by the court of appeals (*viz.*, that respondent battered the man to death with a "weapon of chance" (Pet. App. 12a)) is strained and unpersuasive, at best. That the killers decided to murder their victim by bludgeoning him with whatever was available in the house, knowing that there would surely be something suitable for the task, provides no basis for doubting that the murder was wilful, wrongful, intentional, and without justification or excuse. Compare *Green I*, *supra*, 405 F.2d at 1370 & n.4.

[40] Clarence Atkins testified that he had been sitting in a parked car on Savannah Street (the street on which Bennett's house was located) at about 9:00 p.m. on the evening of the murder (Tr. 505, 531). He saw respondent and Gordon walking "in an opposite direction" from where he was parked (Tr. 505), saw the police "paddy wagon" go "the same way these two gentlemen went" (Tr. 529), and then saw a big, heavy-set man come out of a house across the street (Tr. 506-507, 529, 531). The man "came across the street, got in his car and pulled away" (Tr. 507).

The closing argument of respondent's counsel (J.A. 41-58) was generally an attack upon the credibility of the government wit-

respondent has done just that: asserting a defense he elected not to present at trial.[41]

By setting aside respondent's murder conviction 17 years after the fact and in the face of such an ephemeral claim of prejudice, the court of appeals has totally ignored the concept of finality in criminal convictions. Respondent did not object to these instructions at trial, no issue respecting them was presented or noticed on direct appeal, and respondent has not demonstrated "cause" for his procedural defaults or material prejudice traceable to the errors.

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nesses and an attempt to persuade the jury that the prosecution's theory of the case was improbable. Counsel also presented a defense theory of the case, however, suggesting that the real murderer had escaped from Bennett's house while the police were pursuing respondent and Gordon. Relying on the testimony regarding the times of various events, counsel argued that "the crux of this case" was that the defendants "couldn't have gotten to [Bennett's house] until the screaming started" (J.A. 54). "[I]f the time element is correct that the Government produced, then the beating started before the boys got there * * *" (J.A. 55).

> Suppose these boys went there and they heard the man screaming. They more than likely could. Would they run away? Would they walk down the street and get out of the way? I think they would. * * * Now, the testimony [by Clarence Atkins] is that immediately after he saw the boys walking down the street, he saw this man come out, come across the street, get in his car and go away after the paddy wagon went around the corner.

J.A. 54-55.

[41] The record suggests that defense counsel decided not to argue to the jury that the evidence was insufficient to show malice at least in part because he recognized that the evidence was more than sufficient to establish that element of the offense. See Tr. 449-450 (agreeing that evidence sufficient on second degree murder), 732 ("[t]here may be implicit in the way this murder was committed on [sic] idea of having malice aforethought"); see also *id.* at 455 (characterizing the murder as "very vicious, brutal"). But cf. J.A. 57 ("I don't believe that it is reasonable to assume that these boys, with no weapons, one of them with a strange girl * * * went to 1109 Savannah St. with premeditation and malice aforethought to kill Thomas Bennett * * *.").

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

GEORGE W. JONES
Assistant to the Solicitor General

JOHN R. FISHER
Attorney

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